



Michigan Supreme Court Committee on Model Civil Jury Instructions

Michigan Hall of Justice
P.O. 30104
Lansing, Michigan 48909
Phone (517) 373-4641
MCJI@courts.mi.gov

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October 31, 2006

Corbin R. Davis
Clerk of the Supreme Court
Michigan Supreme Court
925 W. Ottawa
Lansing, MI 48913

Re: ADM File No. 2005-19
Proposed Amendment of Rules 2.512, 2.513, 2.514, 2.515, 2.516, and 6.414 of the
Michigan Court Rules

Dear Mr. Davis:

The Michigan Supreme Court Committee on Model Civil Jury Instructions has considered the jury reform proposals that are the subject of ADM File No. 2005-19. Unless otherwise noted, the comments below represent the consensus view of the Committee.

Rule 2.512 Instructions to Jury

(A) Request for Instructions

- (1) This proposal [formerly MCR 2.516(A)(1)] is duplicative of proposed MCR 2.513(N)(1).
- (4) This proposal [formerly MCR 2.516(A)(1)] is duplicative of proposed MCR 2.513(N)(1).

(B) Instructing the Jury

(2) This proposal [formerly MCR 2.516(B)(3)] is duplicative of proposed MCR 2.513(N)(1).

Rule 2.513 Conduct of Jury Trial

(A) Preliminary Instructions

The committee believes that instructing the jury on the elements should not be mandatory. Although it may sometimes be helpful, cases vary in complexity. When multiple causes of action are asserted, as is often the case, there is frequently an uncertainty as to which causes of action will still be viable at the time of jury deliberation. Should some of the causes of action have been eliminated by then, the jury will have been instructed on claims that should not be discussed during jury deliberations. At best, instructing on the elements of the causes of action should be discretionary with the court, a discretion that is already provided in MCR 2.516(B)(1), which directs the court to "give such preliminary instructions regarding the duties of the jury, trial procedure and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence." (Emphasis added)

The committee objects to requiring that jurors be given written copies of the preliminary instructions, much for the same reasons stated in the proceeding paragraph. In addition, this imposes an additional burden on the parties and the court, which in many cases may be unnecessary. The supplying of written preliminary instructions should be discretionary with the court, if it is to be suggested at all.

With respect to the last sentence of (A), additional clarification is also needed. That sentence provides "MCR 2.512(D)(2) does not apply to such preliminary instructions." GCR 1963, 516.3 provided that the failure of the court to give a preliminary instruction could not be assigned error in any case. That rule was redesignated MCR 2.516 with the August 1, 1984 adoption of the 1985 Court Rules (effective March 1, 1985). As originally adopted, MCR 2.516(B)(1) did not contain the sentence quoted above. That sentence was added by order of January 25, 1985, to be effective March 1, 1985. The Author's Commentary in Michigan Court Rules Practice describes the purpose of that provision:

Although GCR 1963, 516.3 provided that the failure of the trial court to give a preliminary instruction could not be assigned as error in any case, MCR 2.516 contains no such provision. The January 25, 1985 amendment to MCR 2.516(B)(1) clarified the court's intent that reversible error was not automatically committed if the trial court failed to give a requested preliminary instruction. The amendment, however, was not equivalent to

the flat prohibition against assigning error that appeared in GCR 1963, 516.3. Under the current rule, error may be claimed, but any claimed error is subject to the harmless error provisions of MCR 2.613(A). The trial court may exercise its discretion in determining the nature and extent of the preliminary instructions that should be given.

If the Court is going to require preliminary instructions on the elements of all claims, the rule should clearly state that the failure to do so is not automatically error requiring reversal, but that if given, the instructions should be patterned after the style of the model instructions. If the proposal is adopted, this Committee will set about to draft appropriate preliminary instructions.

(B) Court's Responsibility

This provision taken from MCR 6.414(B) should be adopted, thus making it applicable to civil trials as well.

(C) Opening Statements

This provision substantially overlaps MCR 2.507(A) and (F). The Court should consider including the other provisions of MCR 2.507, entitled Conduct of Trials, in proposed MCR 2.513 so that all trial rules will be in one location.

(D) Interim Commentary

The Committee recommends this proposal not be adopted. The phrase "interim commentary" is vague and contains no constraints and is therefore ripe for abuse. The current rules provide that the trial court can give interim instructions. There is no need for anything further.

(E) Reference Documents

The Committee is of the view that counsel are in the best position to determine whether a notebook would be helpful in a particular case. That initiative should come from the parties and be driven by the nature of the case, instead of the court encouraging it in every case. Additionally, the list of items to be inserted in the notebook is very broad and includes items that have not been admitted into evidence. Also, any rule explicitly allowing the use of notebooks should give the trial court the authority to require their use, as opposed to having the trial judge to simply "encourage" their use. The contents of any notebook should also be approved by the trial judge.

(F) Deposition Summaries

The Committee believes this proposal is fraught with pitfalls. More time will be spent deciding what is included than will be saved by reading a summary. Also, credibility is evaluated by the precise words used by the witness, therefore each word is

important. Summaries cannot capture those words.

(G) Scheduling Expert Testimony

- (1) This probably can be done now pursuant to MRE 611(a).
- (2) This can be done now.
- (3) The Committee believes this is completely unrealistic. It is inconsistent with the advocacy system and the rules of evidence. Additionally, this procedure raises the concern that it will be impossible for the trial court to perform its gatekeeper function under MRE 702. Its use also raises confrontation issues in criminal cases.

(H) Note Taking by Jurors

The Committee recommends the proposal be modified as follows:

The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and they should not permit note taking to interfere with their attentiveness. If the court allows jurors to take notes, jurors must be allowed to refer to their notes during deliberations, but the court must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court shall take reasonable steps to ensure that all juror notes are collected and destroyed when the trial is concluded.

The substance of this rule “codifies” what is already the subject of MCJI 2.13 and CJI 2d 2.17.

(I) Juror Questions

This proposal simply “codifies” the current practice.

(J) Jury View

The Committee proposes the following modification, combining the current civil and criminal rules:

On motion of either party, on its own initiative, or at the request of the jury, the court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view, no person, other than ~~an officer designated by the court~~ the trial judge or a person permitted by the trial judge, may speak to the jury concerning the subject connected with the trial. Any such communication must be recorded in some fashion. In civil cases, the court may order the party requesting the a jury view to pay the expenses of the view.

(K) Juror Discussion

The Committee strongly urges the Court to reject this proposal. There is a danger that opinions may tend to be fixed before the completion of the evidence, and a juror who has strongly argued a position may be reluctant and embarrassed to withdraw it later. The procedure also consumes time.

(L) Closing Arguments

This proposal is substantially duplicative of MCR 2.507(E).

(M) Comment on the Evidence

The Committee strongly urges the Court to reject this proposal and to eliminate the comparable provision in the current MCR 2.516(B)(3). The view of the Committee is that the trial judge should be strictly impartial. Furthermore, the jury is already being instructed that factual determinations are solely in its domain. If the provision is intended to inform the jury of the judge's opinion of the evidence, the practice is ripe for claims of error. If, on the other hand, it intends merely to allow the judge to make a purely impartial summation of the evidence, what purpose is served that is not already accomplished by the arguments of counsel?

(N) Final Instructions to the Jury

(1) This proposal [formerly MCR 6.414(H)] is duplicative of proposed MCR 2.512(A)(1),(4) and (B)(2).

(2) There is no reason for questions to be given to the bailiff in a sealed envelope. At least one of the judges on the Committee already invites jurors to ask clarifying questions before being sent out to deliberate.

(3) If it will be mandatory that the jury be provided final instructions, the Committee believes only one copy need be supplied. There is a minority view that mandating written instructions be given will be unduly burdensome because many times instructions are cobbled together from various sources. It would be difficult to put these into an easily presentable format.

(4) This proposal is contrary to the view that the numerical lineup of votes should not be disclosed because it can result in pressure being put on jurors in the minority and can intrude on the secrecy of jury deliberations.

(O) Materials in the Jury Room

The Committee proposes the following rule:

The court shall give the jurors, on retiring to deliberate, their notes and the final instructions. On request, the court shall give the exhibits, where practicable.

(P) Provide Testimony or Evidence

The Committee suggests the following be added to the end of the proposal
“, except in the event of an unreasonable request.”

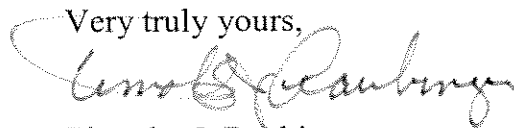
Rule 2.514 Rendering Verdict

- (A) Majority Verdict; Stipulations Regarding Number of Jurors and Verdict**
The Committee suggests the following addition to (3):

if more than six jurors were impaneled, all the jurors may deliberate,
provided the parties agree on the number of jurors necessary to reach a
verdict.

The Committee thanks the Court for the opportunity to comment on these
important proposals.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Timothy J. Raubinger", written over a horizontal line.

Timothy J. Raubinger
Reporter